92-1266

No. 92-____

(2)

Supreme Court, U.S.
FILED
JAN 26 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

E. J. LEIZERMAN

Petitioner,

v.

TOLEDO BAR ASSOCIATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael E. Tankersley
(*Counsel of Record*)
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 833-3000

Mark H. Aultman
Charles W. Kettlewell
150 E. Wilson Bridge Road
Suite 200
Worthington, Ohio 43085
(614) 436-2750

Counsel for Petitioner

January 26, 1993

---

39 pp

APPENDIX TABLE OF CONTENTS

Page

Decisions and Orders Below

Decision of Supreme Court of Ohio on Certified Report by the Board of Commissioners Grievances and Discipline of the Supreme Court (Sept. 16, 1992) A1

Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (March 2, 1992) A7

Order of the Supreme Court of Ohio denying motion for rehearing (Oct. 28, 1992) .. A15

Constitutional Provisions Involved A16

Excerpts from the Record Below

Affidavit of Ron W. Ward A17

Affidavit of Andrew Washington A19

Affidavit of Jerry W. Smith A21

Affidavit of Elvin Williams A24

Order of the United States District Court for the Northern District of Ohio A26

Minnesota Rule of Professional Responsibility 1.8(e) A27

District Columbia Rule of Professional Responsibility 1.8(d) A28

Pleadings Included Pursuant To Rule 14.1(h)

Respondent's Objections to the Board's Findings of Fact, Conclusions of Law, and Recommendations (April 15, 1992) (Excerpt) A30

Motion for Reconsideration With Memorandum In Support (Sept. 25, 1992) A35

APPENDIX

THE SUPREME COURT OF OHIO
1992 TERM

TOLEDO BAR ASSOCIATION v. McGILL

TOLEDO BAR ASSOCIATION v. LEIZERMAN

[*Cite as Toledo Bar Assn. v. McGill* (1992), 64 Ohio St.3d 669.]

Attorneys at law — Misconduct — Public reprimand — Guaranteeing financial assistance to clients while representing them in connection with contemplated or pending litigation.

(Nos. 92-425 and 92-426 — Submitted June 3, 1992 Decided September 16, 1992.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, Nos. 90-56 and 90-58.

In separate complaints filed on October 18, 1990, relator, Toledo Bar Association, charged each of the respondents, Michael E. McGill (Attorney Registration No. 0001839) and E.J. Leizerman (Attorney Registration No. 0011300), with one count of violating DR 5-103(B). In the complaints filed by relator, it was alleged that respondents violated the rule by guaranteeing financial assistance to clients while representing them in connection with contemplated or pending litigation. Respondents answered the complaints by essentially admitting the allegations therein, but denying that such conduct violated DR 5-103(B). In addition, respondents asserted, *inter alia*, that the Disciplinary Rule was unconstitutional under the United States Constitution as applied to FELA ("Federal Employees Liability Act") cases. The matters were thereafter heard by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court on October 21, 1991.

In its findings of fact, the panel found that respondent, Michael E. McGill, was admitted to the practice of law in Ohio in 1974. Prior to obtaining his license, he had worked as an insurance adjuster. Since 1981, his practice has consisted primarily of plaintiffs' personal injury and FELA cases. He has no prior disciplinary violations and has fully cooperated with relator's investigation.

Respondent, E.J. Leizerman, was admitted to the practice of law in Ohio in 1976. He is also admitted to practice in Tennessee and Michigan. Like his partner McGill, Leizerman's primary area of practice is "virtually exclusively personal injury" and he estimated that a majority of his income is derived from FELA cases. He also has had no prior disciplinary violations and has fully cooperated with relator's investigation.

The panel further found that the respondents signed as co-makers on notes to Toledo Trust Company, a.k.a. Trustcorp Bank, Ohio, n.k.a. Society Bank, for the purpose of obtaining and guaranteeing loans of funds to clients who needed the funds in order to be able to withstand delays in litigation. The total amount of the notes due for the twelve clients named in the complaint as of November 15, 1989 was $93,800 in principal sum. It was stipulated with respect to these notes that in nine instances, involving federal FELA cases, the funds were procured by both attorneys. It was further stipulated that with respect to the three notes involving non-FELA (uninsured/underinsured motorist) cases, the funds were procured by McGill. All the notes were generally rolled over periodically and renewed, with additions if necessary, on a ninety-day basis. The testimony before the panel was uncontroverted that Leizerman signed notes in the non-FELA cases after funds had been disbursed to clients in order to protect the integrity of other (FELA) loans at the bank, and that his signing did not directly result in the advancing of money to those clients.

The testimony was also uncontroverted that all the loans were given only to already-existing clients who needed the money to withstand delays in litigation. There was no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a recognized financial institution. These loans were made only after the clients personally convinced the respondents that the loans were needed. The panel also found that there was no evidence of any interference with respondents' independent professional judgment.

Affidavits from ten of the twelve clients involved were submitted with the stipulations. These affidavits attested to the facts that the monies borrowed were used for medical expenses, living expenses during pending litigation, or settlement negotiations; that each client understood his ultimate responsibility to repay his or her loan; and that each client was satisfied with the handling of his or her case by respondents.

The panel concluded that the constitutional challenge to the Disciplinary Rule in question was beyond its jurisdiction to consider, and that the conduct of respondents in guaranteeing loans to clients for expenses other than those of litigation violated DR 5-103(B), which provides as follows:

"While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."

The panel therefore recommended to the board that each respondent receive a six-month suspension from the practice of law.

The board adopted the findings of fact and conclusions of law of the panel, but recommended that the six-month suspensions be stayed on condition that there are no further violations of DR 5-103(B).

Jonathan B. Cherry and *Peter L. Moran*, for relator.

Charles W. Kettlewell, for Michael E. McGill.

Charles W. Kettlewell and *Mark H. Aultman*, for E.J. Leizerman.

John J. Rossi and *James L. Cox, Jr.*, urging dismissal *pro hac vice*, for *amicus curiae* Academy of Rail Labor Attorneys.

Bob Gibbins and *Jeff White*, urging dismissal *pro hac vice*, for *amicus curiae* American Trial Lawyers Association.

Per Curiam. We agree that respondents committed the disciplinary violations found by the board. Nevertheless, we find some merit in respondents' assertion that DR 5-103(B) should perhaps be re-examined.[1] While the actions undertaken by respondents constituted violations of DR 5-103(B), the arguments raised by them, regarding this rule, warrant some review.

---

[1] Other states have reexamined their disciplinary rule to consider the policy issues raised by DR 5-103. For example, Minnesota's version of DR 5-103 permits loans to clients if:

1. The client demonstrates substantial financial hardship; and

2. Without the loan the client would be forced to accept an inadequate settlement; and

3. The fact that the loan may be available is not advertised by the lawyer.

See Minnesota Rules of Professional Conduct, Rule 1.8(e)(3) (amended Sept. 1, 1985); see, also, District of Columbia Rules of Professional Conduct. Rule 1.8(d)(2) and Comment [5].

Accordingly, we reject the recommendation of the board, and order that both respondents be publicly reprimanded. Costs taxed to respondents.

Judgment accordingly.

SWEENEY, DOUGLAS H. BROWN, and BRYANT, JJ., concur.

WRIGHT, J., concurs in judgment only.

MOYER, C.J., and Holmes, J., dissent.

PEGGY BRYANT, J., of the Tenth Appellate District, sitting for RESNICK, J.

MOYER, C.J., dissenting. I dissent from the majority opinion and would adopt the recommendation of the Board of Commissioners on Grievances and Discipline that respondents be suspended for six months and that the suspension be stayed on the condition that they engage in no further conduct that constitutes a violation of DR 5-103(B).

The majority has sanctioned respondents with a public reprimand apparently because the majority believes that DR 5-103(B) "should perhaps be reexamined." While I do not disagree with the majority's conclusion in that respect, I do disagree with the majority's conclusion that because we believe that a Disciplinary Rule should be reviewed and perhaps be amended in the future, such possibility of reexamination constitutes a valid reason to reduce a sanction for past conduct that clearly violates the existing rule.

HOLMES, J., dissenting. Believing that there has been a serious violation of existing DR 5-103(B), I dissent from the majority opinion. The majority readily states that such violations occurred, but radically tempers the sanction on the basis that this court may in the future alter the applicable Disciplinary Rules. This seems to be a most unusual manner to administer our Disciplinary Rules.

The basic purpose underlying the Disciplinary Rule addressed in this matter is to curtail or regulate the unprofessional solicitation of clients through the advancement of monies, or the direct assistance in attorney money, during the course of litigation. This rule has been generally accepted as a reasonable rule to effect the intended result. Until properly reviewed and amended by rule of this court, DR 5-103(B), as interpreted by the Board of Commissioners on Grievances and Discipline here, should be followed.

Therefore, I would accept the recommendation of the board in this matter that each respondent receive a six-month suspension from the practice of law, but that the suspension be stayed on the condition that there are no further violations of DR 5-103(B).

MOYER, C.J., concurs in the foregoing dissenting opinion.

THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

No. 92-426, filed March 2, 1992

In re:	:	Case No. 90-56 AND Case No. 90-58
Complaint against: Michael E. McGill Atty. Registration #0001839	:	FINDINGS OF FACT, CONCLUSIONS OF
E.J. Leizerman Atty. Registration #0011300	:	LAW, AND RECOM-DATIONS OF THE
RESPONDENTS,	:	BOARD OF COMMIS-SIONERS ON
Toledo Bar Association,	:	GRIEVANCES AND DISCIPLINE OF
RELATOR.	:	THE SUPREME COURT OF OHIO

A hearing was held in regard to the above captioned cases on October 21, 1991 in the offices of the Toledo Bar Association, 311 North Superior Street, Toledo, Ohio.

Both Respondents were present at the hearing accompanied by their counsel, Charles W. Kettlewell. Relator, the Toledo Bar Association, was represented by Jonathan B. Cherry and Peter L. Moran.

The Hearing Panel consisted of Charles M. Diamond, Robin G. Weaver, and Frederick L. Oremus, who served as Chairman. No member of the Hearing Panel was from the district wherein the Complaints originated, nor had any member of the Panel served on the Probable Cause Panel which previously considered these cases.

The Complaints in these cases were filed on October 18, 1990, and Respondents were served with notice of the filing on November 9, 1990. Both Respondents filed Answers on November 26, 1990. Respondents filed Amended Answers on April 9, 1991. Hearings in these cases were originally scheduled in both April and May 1991, but were vacated due to scheduling conflicts.

The Complaints against both Respondents allege violations of DR 5-103(B) in that while representing clients in connection with contemplated or pending litigation, they advanced or guaranteed financial assistance to their clients.

At the Hearing, the parties submitted Stipulations complete with exhibits, the salient provisions of which are as follows:

2. On November 15, 1989, and for some time before and after that date, Respondents assisted certain of their clients whom they were representing in connection with contemplated or pending litigation, to obtain loans from Trustcorp Bank, Ohio, now known as Society Bank. Respondents obligated themselves as co-makers on at least twelve such loans.

3. As of November 15, 1989, Respondents were co-makers on twelve outstanding obligations totaling $93,800.00 in principal sum. A schedule of the name of the client and the principal amount of each such loan at that time is attached hereto as Joint Exhibit 1.

4. Of the twelve notes in issue, nine of them involve FELA cases and three involve uninsured/ underinsured motorist claims. Both attorneys assisted in procurement of loans for the nine FELA clients by co-signing ninety (90) day bank notes at Society Bank (fka Trustcorp). Mr. McGill procured

funds for the three non-FELA clients. Mr. Leizerman did not procure funds for the three non-FELA clients, but did sign those three notes after the disbursements were made.

5. Relator does not have evidence to introduce which would indicate that either Respondent directly used the availability of loans or other financial assistance for purposes of soliciting clients, and has not charged Respondents with improper solicitation.

6. The notes attached hereto as Joint Composite Exhibit 2 are true and accurate copies of the notes executed by Respondents in connection with the loans. These notes were generally rolled over periodically and renewed on a ninety (90) day basis, with the interest due on each note either paid by the attorneys as a condition of the renewal or paid by the client from additional advances.

7. True and accurate copies of the fee contracts for the twelve clients in question are attached hereto as Joint Composite Exhibit 3.

8. Mr. McGill and Mr. Leizerman each maintain that his independent professional judgment in regard to these clients has not been interfered with in any manner.

9. Mr. McGill and Mr. Leizerman have consistently testified that it was always their belief, intent, and understanding that the money obtained by the notes was to be used by each respective client solely for the reasonable and necessary medical and living expenses of each client, and not for litigation expenses.

Joint Exhibit 1

TRUSTCORP BANK November 15, 1989

OUTSTANDING NOTES FOR LEIZERMAN AND McGILL

1.	Andrew Lodzinski	$ 2,000.00
2.	Richard Greenfield	21,500.00
3.	Verniece Skiles	7,000.00
4.	Andrew Washington	10,700.00
5.		
6.	Robert Krasniewski	12,500.00
7.	Larry Makula	8,000.00
8.	Robert Norton	5,000.00
9.	Paul Arnold	5,000.00
10.	Albert Lloyd	4,500.00
11.	Jerry Smith	10,000.00
12.	Gerald Maltman	2,100.00
13.	Walter Tippie	5,500.00
		$93,800.00

In addition to the Stipulations and Joint Exhibits, Relator presented the testimony of both Respondents as upon cross-examination. Respondents again testified during their case in chief; presented testimony from Michael J. Hoover, a Minnesota attorney, who had served as Minnesota Director of Lawyers Professional Responsibility from 1979 to 1985; and introduced letters and affidavits from two attorneys, an insurance adjuster and an orthopedic surgeon.

FINDINGS OF FACT

Respondent, Michael E. McGill, was admitted to practice in Ohio in 1974. Prior to obtaining his license he had worked as an insurance adjuster. Since 1981, his practice has consisted primarily of plaintiffs' personal injury and FELA (Federal Employees Liability Act) cases. He has no

prior disciplinary violations and fully cooperated with Relator's investigation.

Respondent, E. J. Leizerman, was admitted to practice in Ohio in 1976. He is also admitted in Tennessee and Michigan. Like his partner, McGill, his primary area of practice is personal injury and he estimated that 50-75% of his "income comes from FELA cases." He has had no prior disciplinary violations and fully cooperated with Relator's investigation.

The Respondents signed as co-makers of notes to Trustcorp Bank, nka, Society Bank, for the purpose of obtaining loans of funds to clients who needed the funds in order to be able to withstand delays in litigation (Tr., p. 51). The total amount of the notes due for the twelve clients named in the complaint as of November 15, 1989, was $93,800 (Stip. 3). It is stipulated with respect to these notes that in nine instances, involving federal FELA cases, the funds were procured by both attorneys. It is stipulated that with respect to the three notes involving non-FELA cases, the funds were procured by Mr. McGill (Stip. 4). All the notes were generally rolled over periodically and renewed, with additions if necessary, on a ninety-day basis (Stip. 6). The testimony is uncontroverted that Mr. Leizerman signed notes in the non-FELA cases after funds had been disbursed to clients in order to protect the integrity of other (FELA) loans at the bank, and that his signing did not result in the advancing of money to those clients (Tr., pps. 41, 150).

The testimony is uncontroverted that all the loans were given only to already existing clients who needed the money to withstand delays in litigation (Tr., p. 32). There is no evidence of improper solicitation. Once it was determined loans were needed, they were facilitated openly from a regulated financial institution (Tr. 31). These loans were made only after the clients personally convinced the Respondents that they were needed (Tr., p. 187-9). There

is no evidence of any interference with Respondents' independent professional judgments.

Affidavits from ten of the twelve clients involved were submitted with the Stipulations. These affidavits attested to the facts that the monies borrowed were used for medical and/or living expenses during pending litigation and/or settlement negotiations; that each client understood his ultimate responsibility to repay his or her loan; and that each client was satisfied with the handling of his case by Respondents.

Mr. Hoover testified that Minnesota had a similar disciplinary issue raised under its former DR 5-103. In 1985 the Minnesota Supreme Court changed its rule to permit loans made to clients if:

1. The client demonstrates substantial financial hardship; and
2. Without the loan the client would be forced to accept an inadequate settlement; and
3. The fact that the loan may be available is not advertised by the lawyer.

Respondents introduced a letter from Attorney Douglas Roberts, as well as affidavits from Attorney Mark Kitrick and a Toledo orthopedic surgeon, indicating a trend among health care creditors not to accept letters of protection. An affidavit of Ronald Moore, a retired railroad insurance claims agent, was introduced attesting to the fact that the railroad industry intentionally attempts to delay FELA cases in order to force injured employees to settle their claims.

CONCLUSIONS OF LAW

DR 5-103(B) provides as follows:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not

> advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Based upon the Stipulations, Exhibits and the testimony, the Panel concludes that the conduct of the Respondents, Michael E. McGill and E. J. Leizerman, in guaranteeing loans to clients for expenses other than those of litigation, violated DR 5-103(B).

Relator argues that in light of the grand extent of these loans (twelve loans totaling in excess of $93,000) as well as Respondents' flagrant disregard of DR 5-103(B) of which they both acknowledged awareness, that Respondents should each be suspended from the practice of law for one year.

Respondents advanced several Constitutional challenges to DR 5-103(B) which the Panel concluded were beyond its jurisdiction to consider. Additionally, Respondents have submitted a request to the Ohio Supreme Court to amend DR 5-103(B) consistent with the Minnesota experience. The Panel is advised that the Ohio Supreme Court has not yet acted on Respondents' request. Finally, Respondents argued that if a violation were found, the appropriate sanction would be a public reprimand.

In the instant cases, Respondents guaranteed loans for living and medical expenses of needy clients after representation had begun. There was no advertising or solicitation. Clients remained ultimately responsible for the loans. While no clients were harmed and there was no evidence that the independent professional judgment of either Respondent was compromised in any way, there was a clear, intentional violation of the Disciplinary Rule for

which the Panel recommends that the Respondents receive a six-month suspension.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 14, 1992. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board voted to impose a six month suspension on the Respondents, Michael E. McGill and E. J. Leizerman, but that the suspension should be stayed on condition that there are no further violations of DR 5-103(B). This sanction will deter knowing violations of the Code of Professional Responsibility but not harshly punish the Respondents if future violations do not occur. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/Jonathan W. Marshall
JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

THE SUPREME COURT OF OHIO
1992 TERM

	To wit :	October 28, 1992
Toledo Bar Association, Relator,	:	Case No. 92-426
v.	:	**REHEARING ENTRY**
E. J. Leizerman, Respondent.	:	

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article VI of the Constitution of the United States provides, in relevant part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

State of Ohio)
) ss
County of Lucas)

AFFIDAVIT

September 1, 1990

Now comes Ron W. Ward, a resident of the City of Toledo, Lucas County, Ohio and after first being duly sworn according to law, swears and avers as follows:

1. I was formerly employed by Consolidated Rail Corporation (Conrail), a railroad company engaged in interstate commerce, in the capacity of Claims Agent in Toledo, Lucas County, Ohio.

2. As part of my duties and responsibilities in connection with the aforesaid employment, I investigated, evaluated, negotiated, adjusted and/or litigated many hundreds of claims by employees and other persons making claims or demands for personal injuries against Conrail both within and outside of the State of Ohio.

3. I was authorized by Conrail to advance sums of money to persons making claims against Conrail to provide for their living expenses during the pendency of their claims. I did, in fact, arrange for hundreds of thousands of dollars of said advances; however, once a person retained legal counsel, all such advances ceased in accordance with the policy of Conrail.

4. I negotiated cases with attorneys both within and outside of the State of Ohio and have learned from these attorneys and their clients of the custom and practice of attorneys advancing funds or guaranteeing loans for the purpose of providing for living expenses and sustenance of said clients during the pendency of their claims. As a result, I have learned over the years that this was a very

common custom and practice and it was common knowledge on the railroad that attorneys advanced money and/or guaranteed bank loans for clients.

5. As part of my training and direction from Conrail, I was instructed to and frequently and purposely delayed the resolution and settlement of cases, particularly with respect to unrepresented persons and/or persons known to me to have no sources of income.

6. It was railroad policy to investigate the financial and living conditions of claimants and I was instructed and encouraged to withhold settlement authority and offers from persons known to be destitute. Frequently, I was able to negotiate settlements with these persons on a greatly reduced basis and in amounts which were, in my opinion, grossly low and inadequate.

7. That I aver and provide all of the information contained herein based upon actual, first hand knowledge and information.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Ron W. Ward

Sworn to and subscribed by Ron W. Ward, a person known to me, who appeared and affixed his signature hereinabove in my presence this 1st day September, 1990.

/s/ Constance Marie Murphy
Notary Public

AFFIDAVIT

STATE OF OHIO)
) :ss
COUNTY OF LUCAS)

Now comes Andrew Washington, being first duly sworn and states as follows:

1. On or about August 26, 1986, I was injured while working for Consolidated Rail Corporation.

2. On or about August 28, 1990, I met with Attorneys E. J. Leizerman and Michael E. McGill and signed a fee agreement with them and the law firm of Leizerman, McGill & Williams.

3. At no time during our discussion at that time regarding my injuries did Mr. Leizerman or Mr. McGill suggest to, or promise me, that I could get as advance of money to cover my living expenses while my case was being handled.

4. It was not until some time thereafter that the subject of living expenses came up. Mr. Leizerman and Mr. McGill assisted me in obtaining a loan from Trustcorp Bank on or about September or October or 1986. At the time I filled out the loan application I was told clearly by Mr. Leizerman and Mr. McGill and the bank that it was my responsibility to repay the loan, with interest, regardless of the outcome of my case. I fully understood this and agreed to it prior to signing the loan application or receiving any money.

5. Even after I had been off from work for a year the Railroad Retirement's offer of settlement was less than Ten Thousand Dollars ($10,000.00) to settle my claim. It is my opinion and belief that not until Conrail understood they could not wait-me-out, that my case settled for the

more fair and realistic amount of Sixty Thousand Dollars ($60,000.00).

6. That any proceeds from the Trustcorp loan were necessary for the support of my family and were used solely for that purpose.

FURTHER AFFIANT SAYETH NOT.

/s/ Andrew L. Washington

Sworn to before me and subscribed in my presence appeared, Andrew Washington this 17th day of August, 1990.

/s/ Lynn M. Easton
Notary Public

AFFIDAVIT

STATE OF OHIO)
) :ss
COUNTY OF LUCAS)

Now comes Jerry W. Smith, being first duly sworn and states as follows:

1. On or about May 20, 1987, I was injured while working for Consolidated Rail Corporation. Specifically, I injured my right knee while operating a defective spike puller on Conrail's tracks near Millbury, Ohio.

2. That prior to my May 20, 1987 railroad injury, I injured the same knee, on or about April 17, 1986, when I twisted the knee of loose ballast. As a result of this prior injury, I sustained a torn medial meniscus and made a claim against Conrail without benefit of counsel. During the time that my claim was pending, I received One Thousand, Five Hundred Dollars ($1,500.00) in advances from the Conrail Claims Department in Toledo, Ohio.

3. On or about June 20, 1986, I was forced to settle my claim for this April 17, 1986 injury for the total sum of Fifteen Thousand Dollars ($15,000.00), less the $1,500.00 in advances, which netted me $13,500.00. I believed this settlement to be very low, but I was desparate for money and the Claims Department refused to advance any additional money, causing me to accept their offer.

4. When I reinjured my knee on May 20, 1987, I sought to again negotiate with the Claims Department without a lawyer, but I was advised that they were denying this new claim because it was not a new injury. I was advised by Conrail that I already settled for my knee and that they would not advance money or pay for my new claim involving this same knee.

5. On or about July 27, 1987, I met with Attorney Michael E. McGill and signed a fee agreement with Mr. McGill and the law firm of Leizerman, McGill & Williams.

6. At no time during our discussions prior to retaining my lawyers did either Mr. Leizerman or Mr. McGill suggest to, or promise me, that I could get an advance of money to cover my living expenses while my case was being handled. My decision to retain counsel had nothing to do with loan proceeds.

7. It was not until some time thereafter that the subject of living expenses came up. I was unable to work due to my injuries and had no source of income. Mr. Leizerman and Mr. McGill assisted me in obtaining a loan from Trustcorp Bank on or about December 3, 1987. At the time I filled out the loan application I was told clearly by Mr. Leizerman and Mr. McGill and the bank that it was my responsibility to repay the loan, with interest, regardless of the outcome of my case. I fully understood this and agreed to it prior to signing the loan application or receiving any money and I also understand this fact as of this date.

8. That any proceeds from the Trustcorp loan were necessary for the support of my family and were used solely for that purpose. Without these loan proceeds I would not have survived financially and I would have been forced to negotiate with Conrail on the basis of desperation and not the reasonable value of my case.

9. That on or about May 25, 1990, with my consent and through the efforts of my counsel, I settled my May 20, 1987 claim against Conrail.

10. That I am thoroughly satisfied with the representation and efforts of my attorneys and have no complaints about the loan process mentioned herein.

11. That I make these statements as my voluntary act and deed.

FURTHER AFFIANT SAYETH NOT.

/s/ Jerry W. Smith

Sworn to and subscribed by Jerry W. Smith, a person known to me, who appeared and affixed his signature hereinabove in my presence this 26th day of June, 1990.

/s/ Constance Marie Murphy
Notary Public

AFFIDAVIT

STATE OF OHIO)
) ss:
COUNTY OF LUCAS)

NOW COMES Elvin Williams, being first duly sworn and states as follows:

1. On or about November 2, 1988, I was injured while working for Consolidated Rail Corporation.

2. On or about May 24, 1989, I met with attorney E. J. Leizerman and Michael E. McGill and signed a fee agreement with them and the law firm of Leizerman, McGill & Williams to represent me on a Federal Employer's Liability Act Claim.

3. On or about May 10, 1991, I spoke with Mr. Leizerman at his office in Toledo, Ohio and indicated to him that my Benefit Life and Trust benefits have long since expired and my Railroad Retirement Board benefits expired over a year ago.

4. I am currently destitute and I have no monies by which to live. Approximately 90 days ago, I had to sell my car for living expenses; and during the Winter of 1990, I could no longer afford to rent my house and I presently live in the basement of my mother's house with my daughter.

5. I am 34 years old and I have a 16 year old daughter who lives with me. Last month, my mother permitted me to forego rent payment so that I could buy my daughter clothes.

6. I can no longer afford to wait for my day in court. I must either obtain some amount of funds to live on, for basic transportation for medical purposes, for clothing, etc., or I will have no alternative but to accept whatever settlement the railroad is willing to offer to settle my suit.

FURTHER AFFIANT SAYETH NOT

/s/ Elvin Williams

Sworn to before me and subscribed in my presence this 10th day of May, 1991.

/s/ Suzanne M. Kremnetz
Notary

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Elvin Williams	*	Case No. 3:90CV7311
Plaintiff	*	Hon. James G. Carr
vs.	*	**ORDER**
Consolidated Rail Corporation	*	
Defendant	*	

IT IS HEREBY ORDERED that Plaintiffs counsel, E. J. Leizerman be permitted to advance to plaintiff, Elvin Williams, the sum of One Thousand Five Hundred Dollars $1,500.00 for living expenses and that such sum be repaid out of any proceeds of any settlement or judgment.

/s/ James G. Carr
Hon. James G. Carr

[Filed May 23, 1991]

MINNESOTA RULE 1.8

Rule 1.8. Conflict of Interest: Prohibited Transactions

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

* * *

(Amended September 1, 1985.)

DISTRICT OF COLUMBIA RULE 1.8

* * *

(d) While representing a client in connection with contemplated or pending litigation or administrative proceedings, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or otherwise provide:

(1) The expenses of litigation or administrative proceedings, including court costs, expenses of investigation, expenses of medical examination, costs of obtaining and presenting evidence; and,

(2) Other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding.

* * *

COMMENT:

Paying Certain Litigation Costs and Client Expenses.

[5] Historically, under the Code of Professional Responsibility, lawyers could only advance the costs of litigation. The client remained ultimately responsible, and was required to pay such costs even if the client lost the case. That rule was modified by this Court in 1980 in an amendment to DR 5-103(B) which eliminated the requirement that the client remain ultimately liable for costs of litigation, even if the litigation was unsuccessful. The provisions of Rule 1.8(d) embrace the results of the 1980 modification, but go further by providing that a lawyer may also pay certain expenses of a client which are not litigation expenses. Thus, under Rule 1.8(d), a lawyer may pay medical or living expenses of a client to the extent necessary to permit the client to continue the litigation. The payment of these additional expenses is limited to

those strictly necessary to sustain the client during the litigation, such as medical expenses and minimum living expenses. The purpose of permitting such payments is to avoid situations in which a client is compelled by exigent financial circumstances to settle a claim on unfavorable terms in order to receive the immediate proceeds of settlement. This provision does not permit lawyers to "bid" for clients by offering financial payments beyond those minimum payments necessary to sustain the client until the litigation is completed. Regardless of the types of payments involved, assuming such payments are proper under Rule 1.8(d), client reimbursement of the lawyer is not required. However, no lawyer is required to pay litigation or other costs to a client. The Rule merely permits such payments to be made without requiring reimbursement by the client.

BEFORE THE SUPREME COURT OF OHIO

In Re:	:	
Toledo Bar Association,	:	
Relator,	:	
and,	:	
E.J. Leizerman,	:	Case No. 92-426
Respondent.	:	

RESPONDENT'S OBJECTIONS TO THE BOARD'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

Charles W. Kettlewell
(0016120)
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio, 43085
(614) 436-2570

Jonathan B. Cherry
(0001126)
424 Spitzer Building
520 Madison Avenue
Toledo, Ohio, 43604
(419) 255-5917

Mark H. Aultman
(0019575)
150 East Wilson Bridge Road
Suite 200
Worthington, Ohio, 43085
(614) 436-2750

Peter L. Moran
(0009936)
Louisville Building
620 Madison Avenue
Toledo, Ohio, 43604
(419) 241-8171

Attorneys for Respondent,
E.J. Leizerman

Attorneys for Relator,
The Toledo Bar
Association

[Filed April 15, 1992]

* * *

Proposition of Law No. Four:

AS DR 5-103(B) IS RECOMMENDED TO BE APPLIED TO RESPONDENTS AND ON ITS FACE IF INTERPRETED TO PROHIBIT ALL GUARANTEES OR ADVANCES EXCEPT THOSE SPECIFICALLY ENUMERATED IN THE RULE, IS UNCONSTITUTIONAL, IN VIOLATION OF THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION AND IN VIOLATION, *INTER ALIA*, OF ARTICLE VI, AND OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

If DR 5-103(B) is interpreted as the Toledo Bar Association seeks to have it enforced against Respondents, for the same and other reasons set forth in the preceding proposition of law, the rule is unconstitutional, depriving them and their clients of rights of due process and equal protection, as guaranteed by the federal constitution, and also as violating the Supremacy Clause of the U.S. Constitution.

As the Toledo Bar and the Board of Commissioners recommend DR 5-103(B) be enforced, attorneys would be deprived of their means of livelihood for guaranteeing loans to clients who need funds in order to obtain redress in state and federal courts. Lawyers may not be disciplined for violating rules which violate the federal constitution, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). Lawyers are entitled to due process, under the U.S. Constitution, in disciplinary proceedings, *In Re Ruffalo* 390 U.S. 544 (1968). State rules regulating attorney misconduct are subject to the operation of the federal Supremacy Clause, *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), *Sperry v. Florida*, 373 U.S. 379 (1963).

Disciplinary Rules that are so vague as to fail to give notice of prohibited conduct, or to permit discriminatory enforcement, may be found to be unconstitutional, *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991).

In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the U.S. Supreme Court struck down a state regulation of the practice of law which it *found to unreasonably handicap a claimant's right to petition courts* for redress of grievances. In doing so it said (377 U.S. at 7):

> A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest . . .

It is clear that disciplinary rules which adversely affect client's constitutional rights, are unconstitutional even if they may not be enforced directly against the client. In *Bates v. State Bar of Arizona*, 433 U.S. 350, at 376, the U.S. Supreme Court said, in finding a disciplinary rule unconstitutional, that:

> The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgable.

In *Boddie v. Connecticut*, 401 U.S. 371 (1971), where the U.S. Supreme Court held that due process of law prohibits a state from denying access to state courts to poor persons in divorce actions because of inability to pay court costs and fees, the court (at 383) concluded:

> Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

Where the issue is not simply one of initial access to the courts but rather the ability to achieve justice where legal analysis has already determined there is a compensable case, it is difficult to see on what basis a client may, by affirmative state action taken against that person's attorney, be deprived of the opportunity to continue if the attorney believes it to be in the mutual interest of each to do so.

The State of Ohio has been down this road before, resulting a situation in which an attorney was suspended in the Ohio courts for conduct which the federal courts found not to constitute a violation of federal law. This ultimately created an unseemly situation in which the attorney was permitted to practice in federal courts in the State of Ohio while being prohibited from practicing in state courts, despite the fact that the procedures in his Ohio suspension were found to have violated the U.S. Constitution. In an action which the U.S. Supreme Court noted [*In Re Ruffalo* 390 U.S. 544 (1968) at 546] had been initiated by a local bar association whose president was local counsel for the B&O Railroad, the Supreme Court of Ohio suspended an attorney for, among other things, advancing living expenses to needy railroad plaintiffs. When an attempt was made to have Mr. Ruffalo suspended in federal district court, that court quoted with approval [*In Re Ruffalo*, 249 F.Supp. 432 (1965) at 445] the *dissenting* opinion in *Mahoning County Bar Association v. Ruffalo, supra* (176 Ohio St. at 263):

> The importance of financial aid from his lawyer to an injured workman may spell the difference between injustice and justice. For example, a member of a railroad train crew or yard crew is injured or killed by reason of the negligence of the railroad. The injured man or the dependents, through a fiduciary, contract with a lawyer to represent them in negotiations for settlement of in litigation. The railroad offers a

> meager totally inadequate settlement — a small percentage of what a lawful judgment could be expected. In making this inadequate settlement offer, the claims department of the railroad advises that the railroad can delay final decision for years. In short, the powerful can close the doors of the courts to the weak by reason of the lack of finances of the claimant.

People who will not learn from the mistakes of the past, it is said, are doomed to repeat them. Courts of law are in the fortunate position, however, of having opportunities to reconsider past decisions, and of being able to use past opinions, including dissenting opinions, as a means of re-evaluation when circumstances have changed.

In addition to violating rights to due process and equal protection guaranteed by the U.S. Constitution, enforcing DR 5-103(B) as the Toledo Bar and the Board of Commissioners recommends would violate the Supremacy Clause of the U.S. Constitution. The federal courts have had occasion to consider the matter of state enforcement of DR 5-103(B). In *County of Suffolk v. Long Island Lighting Co.* 710 F.Supp. 1407 (E.D.N.Y. 1989), involving a class action suit, the court said:

> New York could, of course, attempt to enforce its ethical rule DR5-103(B) by initiating a disciplinary proceeding against a New York lawyer who violated the rule in federal court, even though the federal court had approved this departure from the state rule. Such an attempt by the state, however, would be barred by the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, Cl. 2.

* * *

IN THE SUPREME COURT OF OHIO

Toledo Bar Association,	*	No. 92-426
Relator	*	**MOTION FOR RECONSIDERATION**
vs.	*	**WITH MEMORANDUM IN SUPPORT**
E.J. Leizerman	*	
Respondent	*	

NOW COMES Respondent, E. J. Leizerman, and pursuant to Sup. Ct. Rule IX hereby applies for a reconsideration of matters not constituting a reargument of the case heretofore considered by the court, but which should be considered by the court, as more particularly set forth in the following Memorandum.

/s/ E. J. Leizerman
E. J. Leizerman
Respondent *Pro Se*

MEMORANDUM

This is a disciplinary proceeding in which a majority of this court issued a public reprimand to Respondent, E. J. Leizerman, for alleged violations of DR 5-103(B) of the Code of Professional Responsibility. Respondent respectfully submits that there is a material difference in the facts between those in his case and those in the companion case of *Toledo Bar Association v. McGill*, No. 92-425, decided simultaneously with the matter *sub judice*, which requires rehearing and reconsideration by the court.

Respondent specifically refers the court to the stipulation of record reflecting that Respondent, E. J. Leizerman only co-signed bank notes for clients whose F.E.L.A. actions were pending in the Federal District Court. In fact, the court should note that some of these clients did not reside in the State of Ohio, yet sought relief in federal court through an Ohio licensed attorney. This decision by Mr. Leizerman to limit the guaranty of notes to federal court clients was based on his perception of the custom and practice of attorneys practicing F.E.L.A. law in the federal courts to advance funds to clients for living expenses.

In this light, Mr. Leizerman was aware of Rule 39 of the United States District Court for the Northern District of Illinois (attached as Appendix D, Respondent's Objections to the Board's Finding of Fact, Conclusions of Law and Recommendations) authorizing the advancing or lending of money. Mr. Leizerman also sought and received an order from United States Magistrate James G. Carr of the Northern District of Ohio (attached as Exhibit E to Respondent's Objections) to advance money to one F.E.L.A. client, Elvin Williams, when the issue was presented to him by the Toledo Bar Association, yet when this court denied his motion to advance living expenses on October 23, 1991 in Case No. 91-1879, Mr. Leizerman deferred to this ruling and declined to advance monies or guaranty notes thereafter.

The Co-Respondent in this case, Michael E. McGill, did not limit the procurement of bank notes to federal court clients and Mr. Leizerman believes this to be a subtle yet significant distinction between the two cases which the court perhaps did not fully appreciate as it relates to Mr. Leizerman's genuine belief that how he conducted himself would in no way impinge on Ohio DR 5-103. Mr. Leizerman raised a constitutional challenge to DR 5-103(B) under, *inter alia*, the Supremacy Clause of the U. S.

Constitution based upon his federal court representation and practice. This court recognized that such an issue was raised before the Board of Commissioners who decided they were without jurisdiction to consider the same. This issue was also presented in the Briefs filed in this court (See Proposition of Law No. 4). It is submitted, however, that the court, no doubt inadvertently, failed to decide the constitutional due process, equal protection and Supremacy Clause issues as set forth in Propositions 3 and 4 or the issue of apparent propriety or genuine belief. Mr. McGill's case could not and did not take the same posture as he appeared to knowingly violate the rule.

Mr. Leizerman only did what other non-Ohio attorneys have traditionally done when they have appeared in the same U.S. District Courts for the Northern District of Ohio on behalf of F.E.L.A. clients. These attorneys are not sanctioned or disciplined in any way, yet they come into this state and into the same courthouse and do precisely what Mr. Leizerman has done.

To impose the sanction of reprimand upon Mr. Leizerman would seemingly require this court to impose a like sanction upon Magistrate James G. Carr who is a member of the Ohio Bar and who, in the exercise of his discretion and in the sincere belief that his and Mr. Leizerman's conduct was acceptable within the federal court system under the Supremacy Clause, entered an order allowing Mr. Leizerman to advance funds to client Elvin Williams. There is clearly a divergence between state and federal power here, of great constitutional dimension. It is therefore imperative for this court to reconsider its prior opinion in this case in light of the constitutional arguments previously raised with regard to the Supremacy Clause, as well as the doctrines of apparent propriety or genuine belief and Rule IV of this Court, which requires that an attorney commit a willful breach of the Code of

Professional Responsibility before discipline will be imposed.

Finally, there is a major distinction between the conduct of Mr. Leizerman and Mr. McGill in these cases. Although Mr. Leizerman has always recognized the posture with this court with respect to DR. 5-103, he maintains his belief that his conduct did not fall below the ethical standards that existed in the United States District Court. These loans were not made in a clandestine or secretive manner; they were open and above-board, and made through a reputable lending institution for a very small percentage of Mr. Leizerman's clients, all of whom had F.E.L.A. cases pending in the United States District Court.

It is not fair to punish Mr. Leizerman for conduct that, on its face, appeared to be within both the province and discretion of the ethical standards of the U.S. District Court. It is equally clear that unlike the situation with Mr. McGill, Mr. Leizerman declined to enter into this type of arrangement with any other clients. Thus, it was unfair for the court to mete out the same punishment to both Mr. Leizerman and Mr. McGill on the disparate facts presented.

WHEREFORE, it is respectfully submitted that the court reconsider its previous ruling against Respondent E. J. Leizerman in case No 92-426 and, upon reconsideration, dismiss the complaint against him.

Respectfully submitted,
/s/ E. J. Leizerman
E. J. Leizerman (0011300)
Respondent, *Pro Se*
717 Madison Avenue
Toledo, Ohio 43624
(419) 243-1010
Fax: 243-8200